

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to: David Williams
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Attn: Jim Kurdziel

from: Ashton P. Trice,
Chief, Branch 2
(Procedure & Administration)

subject: Section 7216 -- Use of an Opt-out Check-the-box 'Consent'

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether a tax return preparer may use a taxpayer-customer's e-mail address, provided as part of the tax preparation software's login registration information, to send the taxpayer promotional materials if, on the software's login page or screen, the tax return preparer provides to the taxpayer an 'opt-out' check-the-box option to decline receipt of the promotional materials.

CONCLUSION

No. The e-mail address is tax return information. A tax return preparer may not use tax return information for purposes of section 7216 to send their clients promotional offers which are not specifically exempted by the provisions of § 301.7216-2 without obtaining taxpayer consent that meets the requirements of § 301.7216-3. The 'opt-out' check-the-box option does not fulfill the legal requirements for a valid consent.

FACTS

An online tax return preparer offers online federal tax preparation software and services. To use the online tax return preparer's software, a taxpayer must login and register. The taxpayer must provide his or her e-mail address as part of the login process. The taxpayer is also prompted to "check this box if you do not want to receive promotional offers" in a field located on the login page. If the taxpayer does not check the box the

taxpayer will receive, via e-mail, various promotional materials. If the taxpayer checks the box the taxpayer will not receive any promotional offers.

LAW AND ANALYSIS

The rules governing a tax return preparer's disclosure or use of information received in connection with preparing a return are set forth in regulations under section 7216. Current regulations are applicable to disclosures or uses occurring prior to January 1, 2009. On that date new regulations become applicable. Both sets of regulations are discussed below.

A. Law

1. Current Regulations (applicable to disclosures or uses of tax return information occurring on or before December 31, 2008)

'Tax return information,' for purposes of section 7216, is defined by § 301.7216-1(b)(3) to include "any information, including but not limited to a taxpayer's name, address, or identifying number, which is furnished in any form or manner by a taxpayer for, or in connection with, the preparation of a tax return of such taxpayer." See also I.R.C. § 7216(a)(1) ("any information furnished to [a tax return preparer] for, or in connection with, the preparation of [an income tax] return"). Section 301.7216-2(j), however, provides that the provisions of § 301.7216-1 do not apply to disclosures or uses of "information which is identical to tax return information...if such identical information was obtained otherwise than in connection with the preparation of...a tax return."

Section 301.7216-3(a)(1)(i) states: "If a tax return preparer has obtained from the taxpayer a consent described in paragraph (b) of this section, he may use the tax return information of such taxpayer to solicit from the taxpayer any additional current business, in matters not related to the Internal Revenue Service, which the tax return preparer provides and offers to the public." Paragraph (b) outlines the form requirements of a valid consent, which include a separate written consent, signed by the taxpayer, containing: the names of the tax return preparer and the taxpayer; the purpose for which the consent is being furnished; the date the consent is signed; and statements of prohibition of disclosure or use for purposes other than those listed in the consent and of affirmative assent by the taxpayer. Treas. Reg. § 301.7216-3(b).

The current regulations do not define the term 'use.' Black's Law Dictionary defines 'use' as "the application or employment of something." Black's Law Dictionary 1540 (7th ed. 1999). This definition is supported by Merriam-Webster, which defines 'use' as "the act or practice of employing something" and "the privilege or benefit of using something." Merriam-Webster Online Dictionary 2008.

Section 301.7216-2 provides a limited list of disclosures or uses that may be made by a tax return preparer without the formal consent of a taxpayer. Section 301.7216-2(m)

allows a tax return preparer to compile and maintain a list of "names and addresses of taxpayers whose returns he has prepared or processed." This list can be used to contact the listed taxpayers "for the purpose of offering tax information or additional tax return preparation services to such taxpayers." Treas. Reg. § 301.7216-2(m).

2. Revised Regulations (applicable to disclosures or uses of tax return information occurring on or after January 1, 2009)

TD 9375, published January 7, 2008, updates the current section 7216 regulations, and its provisions are applicable to disclosures or uses of tax return information occurring on or after January 1, 2009. These new, revised regulations retain the basic definition contained in the current regulations, providing: "The term tax return information means any information, including, but not limited to, a taxpayer's name, address, or identifying number, which is furnished in any form or manner for, or in connection with, the preparation of a tax return of the taxpayer." Treas. Reg. § 301.7216-1(b)(3)(i). The revised regulations further provide that "[i]nformation is considered 'in connection with tax return preparation,' and therefore tax return information, if the taxpayer would not have furnished the information to the tax return preparer but for the intention to engage, or the engagement of, the tax return preparer to prepare the tax return." Treas. Reg. § 301.7216-1(b)(3)(i)(D). The revised regulations also exempt information from being classified as tax return information if that information is "identical to any tax return information that has been furnished to a tax return preparer" and "the identical information was obtained otherwise than in connection with the preparation of a tax return." Treas. Reg. § 301.7216-1(b)(3)(i)(C).

"Unless section 7216 or § 301.7216-2 specifically authorizes the disclosure or use of tax return information, a tax return preparer may not disclose or use a taxpayer's tax return information prior to obtaining a written consent from a taxpayer, as described in this section." Treas. Reg. § 301.7216-3(a)(1). All consents to use tax return information must contain: the names of the tax return preparer and the taxpayer; a description of the particular use authorized; a specification of the tax return information to be used; and the dated signature of the taxpayer. Treas. Reg. § 301.7216-3(a)(3)(i).

The revised regulations provide a definition for "use" of tax return information. "Use of tax return information includes any circumstance in which a tax return preparer refers to, or relies upon, tax return information as the basis to take or permit an action." Treas. Reg. § 301.7216-1(b)(4)(i).

Section 301.7216-2 of the revised regulations also provides a limited list of disclosures or uses that may be made by a tax return preparer without the consent of a taxpayer. Section 301.7216-2(n) allows a tax return preparer to compile and maintain a list of "names, addresses, e-mail addresses, and phone numbers of taxpayers whose tax returns the tax return preparer has prepared or processed." This list can be used to contact the listed taxpayers "for the purpose of offering tax information or additional tax return preparation services to such taxpayers." Treas. Reg. § 301.7216-2(n).

The revised regulations further provide that the Secretary may issue guidance "describing additional requirements for tax return preparers regarding form and content of consents to disclose and use tax return information with respect to taxpayers filing a return in the Form 1040 series." Treas. Reg. § 301.7216-3(a)(3)(ii). The Service issued additional guidance in Revenue Procedure 2008-35, modifying and superseding Revenue Procedure 2008-12, which, among other things, mandates the inclusion of various statements in consents depending on the purpose of the disclosure or use, and provides rules for electronic signatures if a consent is to be furnished electronically. Rev. Proc. 2008-35, Section 4.04. This revenue procedure also provides that all consents must be "affirmative consents," and that "[a] consent that requires the taxpayer to remove or 'deselect' disclosures or uses that the taxpayer does not wish to be made, i.e., an 'opt-out' consent, is not permitted." Rev. Proc. 2008-35, Section 4.04(1).

The revised regulations also define a "request for consent" as "any effort by a tax return preparer to obtain the taxpayer's consent to use or disclose the taxpayer's tax return information." Treas. Reg. § 301.7216-1(b)(7).

B. Analysis

1. Is the E-mail Address Tax Return Information?

The taxpayer's e-mail address has been furnished to the online tax return preparer specifically "for, or in connection with, the preparation of a tax return for that taxpayer." Treas. Reg. § 301.7216-1(b)(3) (current); Treas. Reg. § 301.7216-1(b)(3)(i) (revised). The sole purpose of the online software is to allow the taxpayer to file his or her return online. The e-mail address is the primary contact interface used by the online tax return preparer and the taxpayer for communications purposes related to the use of the online tax preparation software, for example, if the taxpayer forgets his or her required password for access to the online software.

The online tax return preparer did not obtain the identical e-mail address from other sources. Thus, the exceptions of § 301.7216-2(j) (current) and § 301.7216-1(b)(3)(i)(C) (revised) do not apply. The taxpayer did not furnish the e-mail address to the online tax return preparer "but for the intention to engage, or the engagement of" the online tax return preparer to prepare the return, so it is considered to be "in connection with tax return preparation." Treas. Reg. § 301.7216-1(b)(3)(i)(D) (revised).

Under these circumstances, the e-mail address is tax return information under either the current or revised regulations. See also Treas. Reg. § 301.7216-1(b)(3)(ii), Examples 1 and 2 (revised).

2. Is the Tax Return Preparer "Using" the E-mail Address?

The online tax return preparer intends to exploit the e-mail address provided by the taxpayer to electronically forward promotional materials of an unspecified nature to the

taxpayer. The online tax return preparer would be unable to induce the action of electronically forwarding the promotional materials unless it employs or applies the e-mail address in some manner or form. Sending promotional materials to the taxpayer over the internet through the e-mail address provided by the taxpayer requires the online tax return preparer to rely on the address the taxpayer provided to be able to direct e-mails to the taxpayer.

Further, the online return preparer is "relying upon" tax return information, the e-mail address, "as the basis to take or permit an action," that being the forwarding of promotional materials. Treas. Reg. § 301.7216-1(b)(4) (revised).

Under these circumstances, the online tax return preparer is using tax return information under either the current or revised regulations. Thus, in order to legally use the e-mail address the use must fall within the limited list of uses that may be made by a tax return preparer without the formal consent of the taxpayer as provided by § 301.7216-2 of the current and revised regulations, or the online tax return preparer must obtain from the taxpayer a valid consent to use the e-mail address.

3. Do the Regulations Permit the Use Without Taxpayer Consent?

As previously stated, § 301.7216-2 of both the current and revised regulations provide a limited list of disclosures or uses that may be made by a tax return preparer without the formal consent of a taxpayer. If none of the listed consent exemptions apply to a particular disclosure or use, a tax return preparer cannot use or disclose tax return information without the consent of the taxpayer.

Both the current and revised regulations contain similar exceptions allowing a tax return preparer to use certain taxpayer contact information for the purpose of offering additional tax return preparation services to its client taxpayers. Treas. Reg. § 301.7216-2(m) (current); Treas. Reg. § 301.7216-2(n) (revised). The online tax return preparer intends to use the taxpayer's e-mail address to electronically forward promotional materials of an unspecified nature to the taxpayer. If the promotional materials are limited to the solicitation of additional tax return preparation services, then no consent is needed pursuant to current § 301.7216-2(m) or revised § 301.7216-2(n). However, if the promotional materials go beyond solicitation for additional tax return preparation services, then no other consent exception covers the use of the e-mail address and a consent, in proper form, is required before any use of the e-mail address can occur.

4. Is the 'Opt-out' Check-the-box Option Sufficient Consent?

The 'opt-out' check-the-box option does not constitute a consent for purposes of the current regulations. This option does not fulfill the requirements of § 301.7216-3(b)(1)-(6). This option: is not contained in a separate written document; it is not signed by the

4. *Is the 'Opt-out' Check-the-box Option Sufficient Consent?*

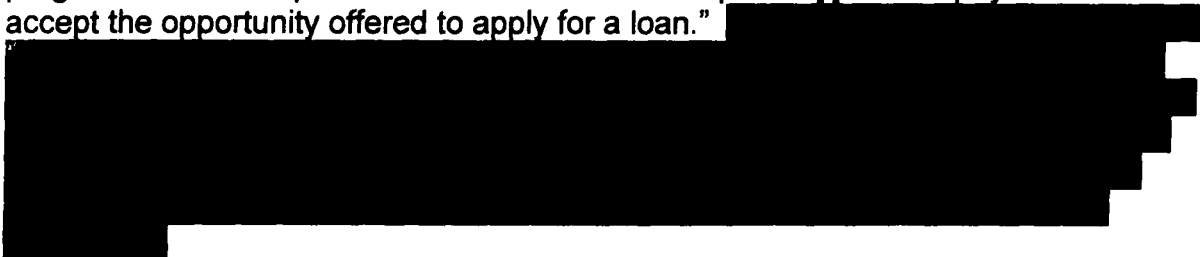
The 'opt-out' check-the-box option does not constitute a consent for purposes of the current regulations. This option does not fulfill the requirements of § 301.7216-3(b)(1)-(6). This option: is not contained in a separate written document; it is not signed by the taxpayer; it does not appear to provide the names of the online return preparer or the taxpayer; it does not provide the date of the taxpayer's signature; it does not contain the required statement of prohibition of disclosure or use for purposes other than those listed in the consent; and it does not contain the required statement of affirmative assent by the taxpayer.

Similarly, for purposes of the revised regulations the 'opt-out' check-the-box option does not constitute a consent. This option does not fulfill the requirements of revised § 301.7216-3. This option violates the Affirmative Consent requirement of Rev. Proc. 2008-35, Section 4.04(2), which specifically prohibits such 'opt-out' consents. This option also does not contain the names of the online return preparer or the taxpayer; it does not specify the tax return information to be used (the e-mail address); it is not signed; it is not dated; and it does not contain the mandated statement provided in Rev. Proc. 2008-35, Section 4.04(1)(a), *Consent to disclose tax return information in context other than tax preparation or auxiliary services*.

In addition, the 'opt-out' check-the-box option, if implemented, would constitute an attempted consent as it is an "effort by a tax return preparer to obtain the taxpayer's consent to use or disclose the taxpayer's tax return information." Treas. Reg. § 301.7216-1(b)(7). Thus, if the taxpayer declines the online tax return preparer's request for consent to use the taxpayer's tax return information, in this case the taxpayer's e-mail address, the online tax return preparer "may not solicit from the taxpayer another consent for a purpose substantially similar to that of the rejected request." Treas. Reg. § 301.7216-3(b)(3).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Example (1) of § 301.7216-3(c) of the current regulations involves bank that preparers tax returns and offers loans to taxpayers who owe tax to pay tax due. This example does not state that a consent is required when the bank uses tax return information, the tax due on the return, to notify the taxpayer of the possible availability of the loan program. The example states that a consent is required "[i]f the taxpayer decides to accept the opportunity offered to apply for a loan."



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